Bird v Allstate Ins. Co.
2020 NY Slip Op 35061(U)
October 9, 2020
Supreme Court, Westchester County
Docket Number: Index No. 58419/2017
Judge: Linda S. Jamieson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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ROBERT BIRD and ROBERT BIRD AS EXECUTOR OF THE ESTATE OF BARBARA BIRD,

Index No. 58419/2017

DECISION AND ORDER

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant.

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The following papers numbered 1 to 5 were read on this motion:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Affirmation and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Memorandum of Law in Reply	5

Defendant insurance company brings its motion seeking summary judgment dismissing this action. Plaintiff is a homeowner who had his homeowner's insurance with defendant. According to plaintiff, after he and his family had paid premiums to defendant for a property in Yonkers for 70 years, they finally had a loss when the property flooded in December 2016 – one month after a new policy coverage period on the property began. Defendant denied the claim, stating that there was no coverage

because the property had been unoccupied for several months, and that plaintiff had failed to notify defendant of this.

Plaintiff contests this, stating that (1) he had notified defendant that his sister, since deceased, was moving out of the Yonkers property to live with him in Utah during her illness. Plaintiff further told the Allstate agent that they would be putting the property on the market, which they did; and (2) because of this notification, for the first time, defendant stopped using the property address, and began to use the Utah address for all correspondence about the insurance premiums. In fact, plaintiff received a letter from plaintiff that confirmed the switch of address from the Yonkers property to the Utah address. This notice said that "We're Confirming Your Policy Change." It went on to state that "I want to let you know that I've made the change(s) you requested to your policy. . . . What has changed? . . . Your mailing address has been changed. A change to the information on the location of the Property. The change took effect 11/18/2015." The next policy renewal, the one in effect at the date of the loss, was sent to the Utah address.

Plaintiff states, without contradiction, that he paid his premiums monthly. He also states that each month, he would call his Allstate agent to discuss the payment. During the course of those calls, he would discuss his sister's condition and how she was faring in Utah. He states in his affidavit that there was no

way that the Allstate agent did not know that decedent had relocated to live with him in Utah during her illness.

The insurance policy contains two provisions that are at issue. The first, relied on exclusively by defendant, requires that the property be occupied as a "residence." The second – which defendant failed to mention in its moving papers – states that "The residence premises may be vacant or unoccupied for any length of time. . . ." Plaintiff states that this provision allowed the premises to be vacant for a time, which "irreconcilably conflicted with the Allstate vacancy clause."

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. Only if the movant succeeds in meeting its burden will the burden shift to the opponent to demonstrate through legally sufficient evidence that there exists a triable issue of fact." *Richardson v. Cty. of Nassau*, 156 A.D.3d 924, 925, 67 N.Y.S.3d 271, 273 (2d Dept. 2017). Here, defendant has established its prima facie case. However, in opposition, plaintiff has raised multiple triable issues of fact, both with respect to notice, as well as to the clash of provisions about whether the premises could be vacant, or had to be occupied as a "residence" in order to be covered. Naturally, defendant contends that these two provisions do not conflict in any way,

and attempts to distinguish the two cases cited by plaintiff that say otherwise.[1]

As the Second Department has recently explained,

> An insurance agreement is subject to principles of contract interpretation. In determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect. A court will not disregard clear provisions which the insurers inserted in the policies and the insured accepted, and equitable considerations will not allow an extension of coverage beyond its fair intent and meaning in order to obviate objections which might have been foreseen and guarded against. Exclusions or exceptions from coverage must be specific and clear in order to be enforced. Ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause.

Ain v. Allstate Ins. Co., 181 A.D.3d 875, 876-77, 122 N.Y.S.3d 340, 341-42 (2d Dept. 2020). *See also Kassapidis v. Maryland Cas. Co.*, 265 A.D.2d 379, 379, 696 N.Y.S.2d 512, 513 (2d Dept. 1999) ("It is well settled that in construing an insurance

[1]"Plaintiffs urge this Court to find an irreconcilable conflict between the residency requirement and the 'Permission Granted to You' provision of the Allstate homeowner's Policy by adopting the flawed reasoning of *Gulati v. Allstate Ins. Co.*, 2017 NYLJ Lexis 2524 (Sup. Ct., Chemung Cty., 2017) (an unpublished opinion from Chemung County Supreme Court) and *Pollicino v. Allstate Indm. Co.*, 2019 WL 4757467 (N.D.N.Y. September 30, 2019) (an opinion of the United States District Court for the Northern District of New York relying in part on Gulati). Both Courts ignored New York case law defining 'reside' for purposes of a homeowner's policy as something more than temporary or physical presence and at least requiring some degree of permanence and intention to remain, thus treating 'reside' as synonymous with 'vacant' or 'unoccupied.'")."

policy, any ambiguities must be resolved in favor of the insured and against the insurer.").

Since it is well-settled that "Where the language of an insurance contract is ambiguous and susceptible to two reasonable interpretations, resolution of the ambiguities is for the trier of fact." *Mawardi v. New York Prop. Ins. Underwriting Ass'n*, 183 A.D.2d 756, 585 N.Y.S.2d 215, 216 (2d Dept. 1992), the question of the clash of provisions is for a jury. Moreover, given the evidence that appears to demonstrate that plaintiff did give defendant notice of his sister's move from Yonkers to Utah, confirmed by the letter he received from defendant, this issue should also be decided by a jury. Defendant's motion is thus denied in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
October 9, 2020

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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